United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7120

To Be Argued By
DAVID L. BIRCH

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-7120

JOSE CORDOVA and AMELIA CORDOVA, individually and as next friend of HECTOR TORRES, a minor, and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

-against-

JAMES REED, as Commissioner of the Department of Social Services of the County of Monroe, and on behalf of all other commissioners of local departments of social services in the State of New York, and ABE LAVINE, as Commissioner of the Department of Social Services of the State of New York,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE STATE COMMISSIONER LAVINE

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TABLE OF CONTENTS

TABLE OF CASES

STATUTES AND REGULATIONS

PAGE

Other Authorities

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BRIEF FOR DEFENDANT-APPELLEE
STATE COMMISSIONER LAVINE

Questions Presented

1. Is the Commissioner of the Department of Social Services of the State of New York, a proper party to this action since appellants have not presented their claim to the State Department of Social Services?

2. Did the District Court properly abstain?

Statement

Plaintiffs-appellants appeal from a decision of the United States District Court for the Western District of New York (Burke, J.), dated March 5, 1975*, dismissing their complaint on the grounds that they had failed to exhaust state judicial and administrative remedies. Appellants sought an injunction against the enforcement of New York Social Services Law § 382 and a declaratory judgment declaring § 382 unconstitutional.

Facts

In August, 1974, Amelia Cordova applied to the Monroe County Department of Social Services for public assistance on behalf of her nephew Hector Torres, who had been sent to Rochester by his mother who remained in Puerto Rico. (Complaint, Par. 11).

* Judgment was entered March 6, 1975.

An employee of the Monroe County Department of Social Services stated on a Comment Sheet dated September 25, 1974, that Hector Torres had just arrived from Puerto Rico, contrary to his aunt's statement that he had been in Rochester for five months, and that the child should be returned to his mother (Appendix, 13).

The Notice of Decision of the Monroe County Department of Social Services, dated September 25, 1974 (Appendix, 14) stated:

> "Your application has been denied because Hector Torres' mother is legally responsible for him and you brought him from Puerto Rico with no plans for supporting him. Furthermore, you did not give complete and accurate information as you stated that he has been in Rochester for 5 months (March) and per phone call to School #11 he was not registered there until 9/74."

The Fair Hearing Summary (Appendix, 15) prepared by the Monroe County Department of Social Services in preparation for the State Fair Hearing scheduled for October 16, 1974, stated:

> "Brief description of facts, evidence and reasons supporting above action: (include identification of specific provisions of law, Board Rules, Department Regulations and approved local policies which support decision):

"Appellant's mother has sent him to live with her sister, Amelia Cordova. By accepting and receiving Hector Torres into their home the Codovas (sic) have accepted the responsibility for his care and maintenance.

"Social Welfare Law 382.1"

Appellants cancelled the State Fair Hearing scheduled for October 16, 1974, alleging that they did "not want to waste their time in a futile proceeding in which their solely constitutional claims herein alleged cannot be adequately adjudicated." (Complaint, par. 17). In lieu of the Fair Hearing, appellants filed a complaint, dated October 29, 1974, in the United States District Court for the Western District of New York, alleging that the New York Social Services Law § 382 is unconstitutional.

In an affidavit, sworn to October 29, 1974, Amelia Cordova stated that her "husband has a take home pay of about $120.00 per week, or $520 per month" (Appendix, 19). The Cordova family, with or without Hector Torres, is thus ineligible for public assistance. Nowhere is it alleged that Hector Torres' mother receives or is eligible for public assistance.

The complaint was dismissed on the motions of defendants Reed and Lavine. Defendant Lavine thus did not answer the complaint.

POINT I

BECAUSE APPELLANTS HAVE NOT PRESENTED THEIR CLAIMS TO THE STATE DEPARTMENT OF SOCIAL SERVICES, DEFENDANT LAVINE IS NOT A PROPER PARTY TO THIS ACTION.

The New York State Department of Social Services has not been permitted by the appellants to make any ruling on Hector Torres' eligibility for public assistance. Although a State Fair Hearing was scheduled for three weeks after the Monroe County Department of Social Services' decision to deny assistance, appellants cancelled that hearing, which may have afforded them relief, in the belief that it would be futile. In its stead, they first filed a complaint, thirteen days after the date of the scheduled hearing, attacking as unconstitutional the statute assigned as the authority for denying Hector Torres assistance by the Monroe County Department of Social Services.

The New York State Department of Social Services has thus had no opportunity to decide whether that statute is applicable to the situation presented by Hector Torres and the Cordovas. Appellants nowhere alleged below any facts that indicate that refusal of assistance in similar situations is a regular policy of the New York State Department of Social Services.

Nor do they point to any regulation of the Department or any policy interpretation made by the Department that would require the Department to affirm the decision of the Monroe County Department of Social Services. At this time, Hector Torres has been denied public assistance not because of any action on the part of the New York State Department of Social Services, but solely as a result of the decision of the Monroe County Department of Social Services.*

This action is premature since the New York State Department of Social Services, which has final supervisory powers over the Monroe County Department of Social Services, has not made any decision about Hector Torres' eligibility for assistance nor has it determined that Social Services Law § 382 is applicable to the Cordovas. This action is untimely, premature and lacks the concreteness, certainty and strict necessity required before the federal courts will dispose of the constitutional

* Arguments supporting the constitutionality of § 382 by counsel, in opposition to appellants motion for an injunction pending appeal, legitimately presented at that time in support of the judgment below (See footnote, p. 11, post) cannot be considered a substitute for the State Department of Social Services' consideration of the case when concretely presented to it at a Fair Hearing. At the time appellants instituted this action, the New York State Department of Social Services had taken no position on Hector Torres' eligibility for assistance and appellants did not point to any document that expressed the State Department's policy on § 382.

issue. Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972); Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969); Rescue Army v. Municipal Court, 331 U.S. 549 (1947). This necessity cannot occur until the New York State Department of Social Services has acted with respect to Hector Torres' application for assistance.

In Hagans v. Wyman, 462 F. 2d 928 (2d Cir., 1972), on remand, ___ F. Supp. ___ (E.D.N.Y., 1972), rev'd and remanded 471 F. 2d 347 (2d Cir., 1973), rev'd sub. nom. Hagans v. Lavine, 415 U.S. 528 (1974), this Court, in remanding a challenge to a regulation of the New York State Department of Social Services, stated:

> "Since it is not yet clear how the state will interpret or implement its recoupment regulation, there is '. . . the need for some further procedure, some further contingency of application or interpretation, whether judicial, administrative or executive . . . to make [ripe] the issue sought to be presented to the Court.' Poe v. Ullman, 367 U.S. 497, 528, 81 S.Ct. 1752, 1769, 6 L.Ed. 2d 989 (1961) (Harlan, J., dissenting). According, before holding state and federal welfare regulations in conflict, '... the appropriate course is to withhold judicial action pending reprocessing,

[under New York fair hearing procedures] of the determinations here in dispute.' Richardson v. Wright, 405 U.S. 208, 209, 92 S.Ct. 788, 789, 31 L. Ed 2d 151 (1972)."

In Hagans, a regulation of the Department was being attacked, so its policy was not entirely unknown to the Court. A fortiori, the present case is not yet ripe for adjudication, since appellants point to no concrete expression of State Social Services' policy.* Accord, Raper v. Lucey, 488 F. 2d 748 (1st Cir., 1973) (There must be a definitive administrative or institutional determination that can be considered final within the institutional structure before an action may arise under 42 U.S.C. § 1983); Palmigiano v. Mullen, 491 F. 2d 978, 980, n.4 (1st Cir., 1974). Thus, this case cannot be ripe for adjudication until the policy of the Department of Social Services has been evidenced.

* On remand, in Hagans, several public assistance recipients who had been through the state fair hearing procedure were permitted to intervene, 47_ F. 2d 347, 415 U.S. 528, 533, n.4. This requirement was not overruled, even sub silentio, in Hagans v. Lavine, 415 U.S. 528 (1974).

In Plano v. Baker, 504 F. 2d 595 (2d Cir., 1974), this Court explained that the doctrine of administrative exhaustion in suits brought under 42 U.S.C. § 1983, as set forth in Eisen v Eastman, 421 F. 2d 560 (2d Cir., 1969), cert. den. 400 U.S. 841 (1970) and Blanton v. State University, 489 F. 2d 377 (2d Cir., 1973) has not been abandoned. The Court, in Plano, recognized that certain benefits are to be derived from a sensible application of the exhaustion doctrine and that exhaustion may be required where it would not be futile or inadequate.*

In Plano, a teacher alleged that he had been discharged for activity protected by the First Amendment and in a manner depriving him of procedural due process. He sought reinstatement and damages. The Court found that the administrative process to which it was urged to remand the plaintiff was not designed to resolve factual issues since the procedure made

* Finnerty v. Cowan, 508 F. 2d 979 (2d Cir., 1974) does not hold to the contrary since, there, the constitutional challenge was to the procedures used by the agency that alleged that administrative exhaustion was necessary.

oral argument discretionary and expressly prohibited the taking of testimony. In addition, the Court did not remand Plano to the administrative process because the First Amendment issues raised lie within the expertise of the Court and Plano sought damages for conspiracy to violate his civil rights which the administrator was not empowered to grant.

It is beyond doubt that resort to the administrative process here would have been beneficial. Under 17 NYCRR 358.4 (a)(1), appellants were entitled to a fair hearing. The hearing is conducted by an impartial hearing officer, who is required to be uninvolved with the action in question, 18 NYCRR 358.13. Appellants were entitled to be represented by counsel, 18 NYCRR 358.15, 358.16(c). The appellants have the right to testify, to produce witnesses, to offer documentary evidence, to cross-examine opposing witnesses, to offer evidence in rebuttal and to examine documentary evidence offered by the opposing party. 18 NYCRR 358.16(c). Thus, unlike Plano, a thorough examination of the facts could have been made.

Notwithstanding the fact that the complaint here is drawn in constitutional terms, it is clear that the object of the complaint is to obtain public assistance for Hector Torres. That objective may have been obtainable through a fair hearing.

Most significantly, the New York State Department of Social Services could have been permitted an opportunity to clarify its policy with respect to Hector Torres' situation. Without a decision on its part, this action against the State Department of Social Services is premature and lacks the necessary concreteness for adjudication.

POINT II

THE DISTRICT COURT PROPERLY ABSTAINED.

Notwithstanding the holdings of Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962) and New York State Waterways Association, Inc. v. Diamond, 469 F. 2d 419(2d Cir., 1972) that abstention is a proper matter for a three-judge district court, the issue is now properly before this Court.*

* Whether the issue of exhaustion of state judicial remedies, which was expressly before the Court below, is the same as the abstention issue, see Harris County Commissioner Court v. Moore, ___ U.S. ___, 43 U.S.L.W. 4222, 4224, n.3 (February 18, 1975), is immaterial, since "the prevailing party below may raise on appeal 'any ground in support of his judgment, whether or not that ground was relied on or even considered by the trial court.'" Blanton v. State University, 489 F. 2d 377, 383, n.7 (2d Cir., 1973) and cases cited therein. Since this is a purely legal issue, a remand is not necessary for determination of facts.

In MTM, Inc. v. Baxley, ___U.S.___, 43 U.S.L.W. 4442 (March 25, 1975), the Supreme Court held that it would hear appeals from the order of a three-judge court denying injunctive relief only where such order was made on resolution of the merits of the constitutional claim. cf. Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974). Had a three-judge court been convened below and had that court determined that abstention was proper in this case, this appeal would still properly be before this Court. This Court, therefore, has jurisdiction to determine that the decision below to abstain was proper.* Thus, assuming arguendo that a three-judge court should have been convened below, "where the undisputed facts clearly dictate that there can be but one ruling by a three-judge court, if convened, [the court has], on occasion, in the interest of conserving judicial resources, affirmed the district

* The only posture where this Court could not properly decide the exhaustion and abstention issues now is if exhaustion and abstention were improper requirements thus making it necessary for a three-judge district court to decide the merits. But, since this action is not properly before a three-judge court on the merits, the decision not to convene a three-judge court below was, at the most, harmless error.

court's denial of a motion to convene such a court rather than remand the case for a useless and expensive ritual." Abele v. Markle, 452 F. 2d 1121, 1126 (2d Cir., 1971); Astro Cinema Corp. v. Mackell, 422 F. 2d 293 (1970). The undisputed facts here demonstrate that abstention was proper. In light of MTM, Inc. v. Baxley, supra, this Court is the proper forum for determining whether abstention was proper. Thus, remanding this case so that a three-judge district court could abstain would do nothing but waste judicial resources.*

* The issue of whether a single judge district court may abstain and the continued vitality of Idlewild Bon Voyage Liquor Corp. v. Epstein, supra, are live issues. In MTM, Inc. v. Baxley, supra, 43 U.S.L.W. at 4443, n.7, the Court stated:

> "There is no occasion for us to decide in this case the circumstances under which a single judge may dismiss the complaint without convening a three-judge court where the ground for such dismissal rests solely on the impropriety of federal intervention. See Steffel v. Thompson, 415 U.S. 452, 457, n.7 (1974); Gonzalez v. Employees Credit Union [supra]."

Moreover, in his concurring opinion in MTM, Inc. v. Baxley, supra, Justice White stated that Idlewild is derelict and should be cleared from the scene.

Social Services Law § 382, cited by the Monroe County Department of Social Services as authority for denying assistance to Hector Torres and alleged as unconstitutional by the appellants is one of more than twenty-five sections of Title 1 -- Care and Protection of Children, one of the seven titles of Article 6 -- Children, of the Social Services Law.

Title 1 provides authority for various aspects of child welfare such as permitting authorized agencies to place out and board children (§ 374) and the licensing of agencies that board children (§§ 377-379). This licensing is also regulated by 18 NYCRR, Chapter I, Part 7.

Section 382 regulates the activities of those in New York State who receive children from outside the State and establishes a licensing and bonding procedure for those who place or board out in New York children who come from out of the State.

Section 382 has never been definitively construed by the Courts of New York State.* It is thus far from certain that the statute was intended to apply to a situation like that of the appellants whereby a close relative brings a child into New York without intention of placing or boarding out the child. Nor is it clear that the statute is a permissible basis by which the Department of Social Services may deny assistance to a child like Hector Torres.

In Railroad Commission of Texas v. Pullman Company, 312 U.S. 496 (1941), the Texas Railroad Commission ordered that all sleeping cars be put in the charge of a Pullman conductor,

* Section 382 has apparently been cited only three times in any reported decisions. By an opinion of the Attorney General, 1945 Opinions of the Attorney General 256, Massachusetts was permitted to place children in New York with other than authorized agencies without the necessity of a license and an indemnity bond on the condition that the two states enter into a reciprocal agreement to that effect.

In Framer v. McCarthy, 205 Misc. 921, 131 N.Y.S. 2d 90 (S.Ct., Spec. Term, N.Y. Co., 1954), an action for a judgment declaring the right of a radio and television program to bring children into New York without violating Section 382 was dismissed on a procedural ground.

In Matter of Paul & Mark, 64 Misc. 2d 382, 315 N.Y.S. 2d 12 (Family Court, N.Y.Co., 1970), the Court, in dictum, stated that § 382(1) violated a child's right to travel.

all of whom were white, instead of being left in the charge of a porter, all of whom were black, under the authority of a state statute that permitted the Commission to "prevent 'unjust discrimination . . . and to prevent any and all other abuses' in the conduct of railroads." 312 U.S. at 499. No Texas Court had determined whether that statute allowed the Commission to make the ruling it had assumed it had the power to promulgate. Notwithstanding the substantial constitutional issues presented by the porters, the Court held that since the constitutional adjudication plainly could be avoided and be made unnecessary by a definitive ruling by the state court on the meaning of the statute, the federal courts should abstain until the state court decided the state issue.

The elements of the abstention doctrine were explained further in later cases. First, the meaning of the state statute must be unclear, uncertain, or unsettled, Harris County Commissioners Court v. Moore, ___U.S.___, 43 U.S.L.W. 4222 (February 18, 1975); Harman v. Forssenius, 380 U.S. 528 (1965); Harrison v. N.A.A.C.P., 360 U.S. 167 (1959). A prior decision by a state court on the state law question is especially desirable where the state law question is enmeshed with the federal question. Reetz v. Bezanich, 397 U.S. 82 (1970).

The extent of the uncertainty has not been extensively analyzed. As indicated in Field, Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine, 122 U. Pa. L. Rev. 1071, 1088-89 (1974) the Court has talked in terms of the statute's being susceptible of a construction to avoid or modify the constitutional question, Lake Carriers' Assn. v. MacMullen, 406 U.S. 498, 510 (1972); of the state resolution's being sufficiently likely to avoid or significantly modify the federal question, Lake Carriers' Assn. v. MacMullen, supra, at 512; of the statute's being fairly subject to the interpretations, Harman v. Forssenius, supra, at 534-35; of the state court decision's conceivably avoiding the necessity for the federal court to decide the federal constitutional issue, Reetz v. Bezanich, supra, at 86-87; and of the federal court's being "unable to agree that the terms of [the statute] leave no reasonable room for a construction . . . which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problems." Harrison v. N.A.A.C.P., supra at 177.

The second element is that a state court be able to construct the state statute so as to avoid or materially alter the nature of the federal constitutional question, Harrison

County Commissioners v. Moore, supra; Kusper v. Pentikes, 414 U.S. 51 (1973).

Abstention is singularly important where the challenged statute is part of an integrated state regulatory scheme that could be disrupted and where the federal court is asked to interfere with an important state function. Lake Carriers' Assn. v. MacMullen, supra; Harman v. Forssenius, supra.

Abstention is also proper where the state law question is particularly within the province of the state court, Harris County Commissioners Court v. Moore, supra, and where the applicability of the statute to the plaintiff is not clear. Harris County Commissioners Court v. Moore, supra; Baggett v. Bullitt, 377 U.S. 360, 376-78 (1964).

This Court has deemed abstention appropriate where the Court was "dealing with part of a complicated and comprehensive regulatory statute intended to strike a balance between differing local interests," Brown v. First National City Bank, 503 F. 2d 114, 118 (2d Cir., 1974) (New York Usury Law). Where the New York State law with respect to the general support obligation of stepparents was "at least somewhat cloudy" this Court stated in Freda v. Lavine, 494 F. 2d 107 (2d Cir., 1970), at 110:

> "State appellate courts may interpret statutes on which the Commissioner [of Social Services] relies to impose a general support obligation on step-parents, thereby eliminating the federal issue. Short of this they may still modify the federal issue."

The Court also acknowledged that "the State courts of New York have exhibited a willingness to interpret the State's statutes so as to avoid any doubts about their constitutionality." Freda v. Lavine, supra, at 110; accord, Blouin v. Dembitz, 489 F. 2d 488 (2d Cir., 1973). (Federal courts should not apply constitutional standard to an uninterpreted statute.)

In Reid v. Board of Education, 453 F. 2d 238 (2d Cir., 1971), notwithstanding the fact that the plaintiffs made no mention of a state claim, the Court ordered the District Court to abstain because a state court decision could obviate the need for a determination of the federal constitutional issue, the state law was unclear, federal adjudication would require the federal court to delve into a sensitive area of state administration, the federal constitutional claim was inextricably intertwined with the operation of the challenged state statute and the state courts could construct the statute to avoid or modify the constitutional question.

The statute challenged here has not only not been applied to the appellants by the New York State Department of Social Services but it has not been construed by the New York State Courts. Its meaning and especially its applicability to a situation presented by the appellants is far from clear. It is part of a comprehensive scheme for the regulation of agencies that place children out for adoption and striking down the statute could halt that important and sensitive state program.

The statute is certainly suspectible of an interpretation that would totally avoid or at least modify the constitutional issue. This case clearly presents a paradigm example of the benefits of abstention.

CONCLUSION

APPELLEE LAVINE IS AN IMPROPER PARTY TO THIS ACTION SINCE APPELLANTS HAVE NOT PRESENTED THEIR CLAIM TO THE STATE DEPARTMENT OF SOCIAL SERVICES, AND SINCE THE DISTRICT COURT PROPERLY ABSTAINED, ITS DECISION SHOULD BE AFFIRMED IN ALL RESPECTS.

Dated: New York, New York
May 8, 1975

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
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MARY KO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Appellants herein. On the 12th day of May , 1975 , she served the annexed upon the following named person :

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Attorneys in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the address es within the State designated by them for that purpose.

Mary Ko

Sworn to before me this
12th day of May , 1975

David L. Rich
Assistant Attorney General
of the State of New York